IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 439 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHIRABHAI NANABHAI MUNIYA

Versus

STATE OF GUJARAT

Appearance:

MS SADHANA SAGAR for Appellant

MR AJ DESAI APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 28/04/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. This Appeal is preferred by Dhirabhai Nanabhai Muniya - original accused in Sessions Case No.219 of 1996 of the Court of Sessions, Panchmahals, against an order and judgment delivered by Additional Sessions Judge, Panchmahals, Camp at Dahod, convicting appellant for the charge proved against him under Section 302 of the Indian Penal Code and sentencing him for life imprisonment and fine of Rs.1,000/- in default to undergo RI for three months. The appellant - accused was given benefit of doubt and was acquitted of the charge under Section 135 of the Bombay Police Act.

2. According to the prosecution case, the incident in question occurred at about 10.30 to 11.00 a.m. on 18.4.1996 at village Nanamal, Tal. Limkheda, District Panchmahal, wherein the present appellant alleged to have killed one Rangabhai Nanabhai his own brother by shooting arrow which hit Rangabhai and pierced in chest. The complaint came to be filed by PW-1 Champaben, widow of the deceased Rangabhai, and accordingly her husband had five brothers including accused, out of which, Rangabhai was number two and amongst the brothers, the agricultural property belonged to the family was partitioned. Sursinh Nanabhai, who was uncle of the accused - appellant, died without leaving any issue and his widow Dhaniben was living. Before six years of the incident, agricultural land belong to Sursinh was purchased by the deceased and this was the cause of dispute between both the brothers i.e. deceased Rangabhai and appellant accused Dhirabhai Nanabhai Muniya. On the day of the incident, PW-1 Champaben and her daughter Kanuben PW-4 were present at their house along with deceased Rangabhai and his mother Kaliben PW-5 and his other aunt Nuriben Manjibhai were also present. At about 10.00/10.30 a.m. accused appellant came to their house uttering abuses and scolded the deceased that why had he taken agricultural land of their uncle alone and why other brothers were not given share in the said land. Deceased replied to the accused - appellant that he had purchased the above said land. Hearing this, accused appellant ran after deceased Rangabhai and pelted two arrows which were dodged by the deceased, but accused appellant pelted third arrow which found its target in the chest of the deceased and, therefore, the deceased fallen down on the ground in the field near the house of the deceased. PW-1 was witnessing this incident. On his shouting, appellant accused along with bow and arrow ran away from the spot. PW-1 Champaben extracted the arrow pierced in the chest of the deceased and when other persons reached to the spot of the offence, deceased Rangabhai was lifted and

carried near one tree. At about 17.15 hours on the same day, a complaint was given by PW-1 Champaben before Limkheda Police Station, which was registered as I-Crime Register No.83 of 1996 and investigation was entrusted to ASI J.M. Baria PW-8 Exh. 22. He submitted charge sheet in the Court of Judicial Magistrate, First Class at Limkheda for the offences under Section 302 of the IPC and 135 of the Bombay Police Act against the appellant accused. The case was committed to the Court of Sessions and learned Additional Sessions Judge framed the charge against the appellant accused vide Exh.2 on 18.2.1997 for the offences punishable under section 302 of the IPC and under Section 135 of the Bombay Police Act.

4. The prosecution examined as many as 8 witnesses and produced on record necessary documentary evidence. After recording further statement of the accused appellant, wherein his defence was of total denial, the learned Additional Sessions Judge, Panchmahal, Camp at Dahod, heard APP and the defence counsel and came to convict the accused and sentenced him as aforesaid and hence this Appeal.

5. PW-1 Exh.6 Champaben is examined by the prosecution as an eye witness. She stated that about the agricultural land of uncle Sursinh, there was a dispute between the accused - appellant and deceased. On the day of incident, when along with her deceased husband and her mother-in-law Kaliben they were in their house, accused appellant came with bow and arrow and was after her deceased husband. He pelted two arrows which were parried by her deceased husband but the third arrow pierced in the chest of the deceased which was extracted by her from the chest of the deceased. She found that her husband had died. She identified the bow recovered from the accused - appellant and the arrow recovered from the scene of offence being muddamal article No.8 and muddamal article No.3 respectively. Thereafter, her husband was lifted and carried near the mango tree and was kept there. At about 12.00 p.m. she went to Limkheda Police Station and gave the complaint, in which she identified her thumb impression. The said complaint is at Exh.23. She was cross-examined. She was asked about the distance of the scene of offence and her house and she stated that she witnessed the incident from the distance of about 500 feet. She stated in cross-examination that the incident took place in the field of the accused - appellant. At the time of the incident in inception deceased was in his field. Thereafter, on account of accused - appellant, deceased ran towards the field of the accused - appellant and

accused appellant chased him and pelted arrows. She was asked about how and in what manner she extracted the arrow from the chest of her husband. She stated that after moving the arrow side ways, she extracted the arrow. Thereafter, her relatives and other persons reached to the spot. Uncle of the deceased husband one Devalo called the Sarpanch and Sarpanch, one Chaturbhai and Devalo went to Limkheda Police Station first and thereafter she had been to Limkheda Police Station and offered her complaint which was registered.

6. PW-2 Exh.7 Dr. Rampralad Mangilal Patil who was serving as Medical Officer at Limkheda Hospital and on 19th of April, 1996 at about 9.00 a.m., he received dead body of Rangabhai Nanabhai for postmortem. He performed the postmortem and found that on the left side chest between second and third ribs, there was a piercing wound of 1 cm x 3 cms oblique and the said injury was antemortem. He found corresponding injuries that lungs were ruptured and due to piercing injury, a wound was caused to the heart. According to PW-2 Dr. Rampralad Patil, the injuries were sufficient in ordinary course of nature to cause death and was possible by arrow, muddamal article No.8. He has been cross-examined wherein the questions are asked about the possibility of injuries in other circumstances like by fall etc. In cross-examination, PW-2 also stated that possibly the arrow was shot from a distance of 15 feet because the arrow was pierced in the chest. He produced on record the Postmortem Note at Exh. 11.

7. PW-3 Nuriben is examined at Exh. 17. She stated that her jeth (elder brother of her husband) had died without leaving any issue. Sursinh had partitioned his land and had given shares to other brothers while the deceased had purchased land from Sursinh. At the time of the incident, she was in her house and she noticed that the accused - appellant ran after the deceased and pelted arrows. The third arrow was hit in the chest of the deceased and thereafter accused - appellant had ran away. PW-1 Champaben extracted the arrow from the chest of the deceased and thereafter she went to Limkheda Police Station and gave complaint. In cross-examination, she was asked about her eye sight because she was about 60 years when her deposition was recorded. In cross-examination she stated that she was out of her house when she noticed the incident. She stated that the incident occurred at about 64 steps from her house. The incident occurred in the property of his jeth Sursinh.

8. PW-4 Kanuben Rangabhai, daughter of the deceased is examined at Exh. 18. She has deposed that the

incident occurred at 11.00 a.m. She was at her house. Her father was also at their house. Thereafter accused appellant came and shoot an arrow on the chest of her father Rangabhai. Third arrow pierced in the chest of Rangabhai. In her cross-examination, she denied that she was grassing cattle at the time of the incident. According to her in cross-examination, she stated that the incident occurred near her house in the field of accused - appellant.

9. PW-5 Exh. 19 Kaliben Babubhai is mother of the deceased and accused - appellant. Though she was eye witness according to the prosecution case, but she has not supported the version of the prosecution. She was declared as hostile and confronted with her police statement.

10. PW-6 Chimanbhai Nathabhai and PW-7 Revala Kaliyabhai are the panchas of panchnama Exh. 24 by which according to the prosecution case the bow and clothes of the accused - appellant were recovered from the accused appellant, but none of these witnesses have supported the prosecution case.

11. Last witness PW-8 Exh. 22 Jokhanabhai Manabhai Bharia is the Investigating Officer and he has narrated that at about 17.15 hours PW-1 Champaben came at Limkheda Police Station and lodged her complaint, which was registered and he investigated the offence and submitted the charge sheet.

12. Learned Trial Judge mainly relying on eye witnesses PW-1 Champaben, PW-3 Nuriben and PW-4 Kanuben Rangabhai, came to the conclusion to convict the accused for the charge under Section 302 IPC. Discrepancy regarding the First Information Report, discrepancies in the evidence of eye witnesses as well as other discrepancies like change of scene of offence were brought to the notice of learned Trail Judge, but the learned Trail Judge discarded these discrepancies labelling them as minor discrepancies not affecting the prosecution case.

13. Learned Advocate appointed for the appellant Ms. Sadana Sagar vehemently urged that there are so many contradictions and discrepancies in the prosecution evidence and in the case and the prosecution was not able to prove the case beyond reasonable doubt. Learned Counsel for the appellant has contended that the FIR is filed by 7 hours late. The scene of offence is changed by each of the witnesses and, therefore, eye witnesses

cannot be believed. Blood-stained clothes of the deceased, accused - appellant and blood stained clothes of accused - appellant and arrow which was recovered from the scene of offence were not sent to the Forensic Science Laboratory nor the sample collected having blood of the deceased was sent to the Forensic Science Laboratory. It was argued that the learned Judge erred in appreciating the evidence of three eye witnesses. There is no other evidence except PW-1, PW-3 and PW-4 to connect the accused - appellant with the crime and the evidences of these witnesses is full of contradictions and discrepancies.

14. Learned APP Mr. A.J. Desai supported the judgment and order impugned in this Appeal on the ground that there is direct evidence of three eye witnesses and there is no reason to disbelieve their evidence. The learned Trail Judge rightly convicted the accused appellant under Section 302 of the Indian Penal Code. In all cases, some discrepancies and contradictions are bound to be there on account of time lapsed between the incident and recording of the depositions and the witnesses being rustic. He urged for the dismissal of the Appeal.

15. Taking into consideration the rival contentions, we undertook threadbare scanning of the evidence i.e. testimonial collection as well as documentary evidence. We carefully re-appreciated the evidence of each witness and we have gone through each corner of the record and proceedings and evidence recorded by the Trail Court along with learned Counsels for the parties. As being first appellate court, it becomes the duty of this court to take into consideration the evidence adduced by the prosecution and re-appreciate the same and to arrive at an independent conclusion as to whether the evidence produced during trail can be relied upon or not. This court must come to the conclusion based upon reappreciation of the evidence that whether the case against the appellant - accused could be proved during trail beyond reasonable doubt. While doing so, the credibility of the witnesses has to be adjudged in drawing inferences from proved and admitted facts emerging from the record and objective satisfaction has to be reached after independent scrutiny of the evidence. Especially when accused - appellant is charged of serious crime like murder, approach of this Court must be cautious, circumspect and careful before upholding the conviction or before reversing the same, the court has to consider the matter carefully and examine all the relevant material circumstances of the case.

16. True it is that, direct evidence in any criminal trial, above all in murder trail, where capital punishment is provided, is supreme kind of evidence, and when such direct evidence of eye witnesses satisfy the conscience of a court on credibility, then this evidence even without corroboration can be acted upon. At the same time, the mere fact that the witnesses are consistent in what they say is not a sure guarantee that they are truthful. It is required that in assessing the credibility of eye witnesses the totality of the circumstances must not escape from the overall appreciation of case by a court. The crucial aspect while assessing the evidence of eye witnesses, would be, whether a particular witness deposing as an eye witness really strikes to judicial mind to be an eye witness though such witness may be consistent in his/her say. Such witnesses at times may not be acceptable for the given reasons. On judicial scrutiny if it is found that the conduct of such witness is such that it makes the case of the prosecution doubtful or incredible and his/her presence at the scene of occurrence as an eye witness is suspected, then his/her evidence can be rejected.

17. In order to adjudge the credibility of the witnesses, the court must not be confined only to the way in which the witness might have deposed or to the demeanour of the witness. The judicial scrutiny includes consideration of the court of the surrounding and attending circumstances as well including probabilities so that a correct conclusion can be reached about the trustworthiness of a given witness. While appreciating and scanning the evidence of eye witness, the court must adhered to, two principles i.e. (i) whether in the circumstances of the case was it possible for the eye witness to present at the scene of offence, and (2) whether there is anything inherently improper or unreliable in the evidence of such witness. In addition to this, as an attending circumstances, it must be explored and weighed on judicial wisdom and scrutiny that whether the witness had opportunity to witness the crime, what was the ordinary conduct of the witness, what was the nearness of the crime and pre-disposition towards the accused.

18. In this case of prosecution where out of four eye witnesses, when we are called upon to appreciate the evidence of three eye witnesses, on threadbare scanning, we found that though the case is of a direction evidence, the prosecution evidence suffers from infirmities to the

extent that we cannot place absolute reliance on the evidence of eye witnesses. It is always easy to depose on oath to have noticed the incident, but such evidence on weighing with all its pros and cons and if noticeable infirmities are found in such evidence then suspected evidence is not safe evidence to convict the accused in serious crime of murder. We noticed the following infirmities in prosecution case and the evidence.

19. It is rule of law in criminal trial that lodging of FIR late without any plausible explanation is always fatal to the prosecution case depending though upon facts and circumstances of each case. This is so because, firstly the prosecution witness obtains time to arrange and manage the circumstances of given incident and some times to rope in accused which may not be the real culprits. Secondly, on First Information Report filed late without any explanation is suspected because the court while assessing such evidence is deprived itself of the immediate first hand version of the occurrence which is utmost necessary to come to a conclusion. Undoubtedly, in this case the incident alleged to have occurred at 10.00 a.m. The First Information Report is lodged before the Limkheda Police Station at 17.15 hours i.e. late by about 7 hours. From the record and from Exh. 23 First Information Report it is clear that the scene of offence is only 10 Kms away from Limkheda Police Station. Even no other circumstance prevented the First Information Report lodged earlier which came to be lodged as late as by seven hours. No iota of reasons much less plausible explanation is coming forward from the prosecution evidence as to how this First Information Report came to be lodged after a delay of about seven hours. It is pertinent to note that PW-1 Champaben in her cross-examination categorically stated that Sarpanch, one Chaturbhai and Devalo had been to Limkheda Police Station for lodging complaint and thereafter at about 14.00 hours she reached at Limkheda Police Station. She also stated in her deposition that before she reached to Limkheda Police Station, particulars of the incident had been referred to the Police Station by persons who preceded to Limkheda Police Station earlier to PW-1 and thereafter she lodged First Information Report. True it is that, when sudden death of her own husband stalks in her family, one cannot be expected to be so prompt as to run to the Police Station as soon as it is found that the person is dead. Perhaps therefore PW-1 stated in her deposition that at about 12.00 p.m. she started from her village to go to Limkheda Police Station i.e. exactly after two hours of the incident, but the fact remains that the complaint came to be registered only at 17.15

hours on that day. The late filing of First Information Report thus renders the prosecution evidence suspicious especially when Limkheda Police Station is only 10 Kms away, and that too no plausible explanation is offered by any of the witnesses for filing the FIR as late as by seven hours. The circumstances leading to filing late FIR inevitably raises an inference that the incident did not take place as eye witnesses stated, but, however, on finding Rangabhai dead by arrow wound and after manipulating the occurrence, the First Information Report came to be lodged. It is established fact that before the incident the dispute about land was very much existed between accused and deceased. This might have led P.W.1 and other witnesses to manipulate and rope in the accused. This is the prime reason we are not inclined to accept the evidence of eye witnesses.

20. The second important infirmity which prosecution case discloses is in respect of scene of offence. Panchnama of scene of offence is placed at Exh. 14. This panchnama is taken on record by consent of the parties, and according to this panchnama the scene of offence is situated in the field of Dhaniben, which was shown by prosecution witness No.1. One arrow was also found from nearby the scene of offence. From 35 feet in the east from the scene of offence there are boundaries of the said field and thereafter there is a filed of one Roopa Nana and his residential house are situated. On the western side after 40 feet from the scene of offence there is boundary of the field and thereafter at about 400 feet the residential house of one Shamabhalji is situated. In the southern direction of scene of offence at about 200 feet residential house of the deceased is situated. However, in between no southern boundary is mentioned in the panchnama of the said field. Now, when we scrutinise the evidence of PW-1, in para 5 of her deposition, PW-1 Champaben categorically stated that the incident occurred in the field of accused - appellant. She also stated that the deceased was in his own field but on account of accused - appellant tried to scold with him, he ran towards the field of appellant - accused and the accused - appellant shoot the arrow in his field and therefore the incident occurred in the field of accused appellant. While we consider the map of scene of offence as placed on record at Exh. 16, we found that nowhere around the scene of offence, field of accused appellant is situated. In the map at Exh. 16 the scene of offence is shown in the field of Dhaniben. PW-3 Nuriben, eye witness, in her cross-examination stated that the incident occurred in the property of his Jeth (elder brother of her husband) Sursinh, while prosecution

witness No.4 Kanuben deposed that the incident occurred in the field of accused - appellant. Undoubtedly, witnesses contradicted as regard to the scene of offence. This fact was though brought to the notice of the learned Trail Judge, the Trail Judge come to the conclusion that only because PW-1 and PW-4 stated that the incident occurred in the field of Dhirabhai Nanabhai appellant - accused, one cannot come to the conclusion that the incident was not occurred on the north of of the house of deceased Rangabhai. We are unable to subscribe the view taken by the learned Trail Judge in this regard because contradictions in scene of offence suggest that firstly the eye witnesses posing themselves to be the eye witnesses might not be present when the incident occurred, and secondly the incident occurred somewhere else and the prosecution witnesses conceal the genesis of the occurrence. We are unable to reconcile these contradiction which is an infirmity apparently surfacing the prosecution case, leading us to believe that it is highly doubtful that either the incident occurred as stated by the witnesses or the witnesses were present when the incident occurred. The version of the eye witnesses therefore become suspicious and this benefit must go to the accused.

21. If we examine the case from the view point of the probability and from the perspective of the events taking place in natural course, then we find that the version of the eye witnesses is against the ordinary natural course of events. All the eye witnesses including PW-1 Champaben in explicit terms stated that after exchange of some sentences between the accused and the deceased, deceased ran from the place where the exchange took place. The deceased was running ahead and accused appellant was chasing him. In this process, when both were running one behind the other, accused appellant running behind, behind the deceased pelted three arrows from the bow. Out of them, two were dodged by the deceased but third one hit directly on the chest of the deceased. Scenario which witnesses have created through evidence is that the deceased was running for his life whose back was towards the accused - appellant. Then how was it possible that an arrow pelted by the accused appellant, towards the deceased who was running and whose back was towards the accused - appellant, was hit in the chest of the deceased. This is not mere improbability but impossibility. It is not the case of the witnesses that during the process when both were running, the deceased turned around and brought front part of his body towards accused - appellant as he was hit by an arrow in the chest as pelted by the accused - appellant. It is

not the case of the witnesses that the accused appellant and the deceased were confronting each other face to face when fatal arrow was shot at the deceased by the appellant accused, but it is the specific case of the witnesses that the deceased was running ahead of the appellant accused and his back naturally was facing accused appellant who was chasing deceased. It is also necessary to take into consideration that according to PW-2 Dr. Rampralad Mangilal the arrow which pierced in the chest of the deceased might have shot from a distance of 15 feet at least. So on the anvil of probability when we weighed the prosecution evidence, we found that the story of the eye witnesses is improbable because if the witnesses are true, then the arrow as pelted by the accused - appellant must have found its target on the back of the deceased and not on the chest. We, therefore, do not incline to lend credence to the evidence of eye witnesses. Above all, there are other contradictions also in the evidence of prosecution. In her complaint at Exh. 23, PW-1 Champaben stated that her husband had purchased the land of his uncle while in her deposition she denied to have purchased the said land. The distance which PW-1 stated in her deposition and as found from the scene of panchnama also does not tally. PW-1 stated in her deposition that she extracted the arrow and blood was pouring profusely from the wound but as per the panchnama of the scene of offence there were no trace of profused bleeding on the earth. It is also necessary to take into consideration that according to eye witnesses as soon as the deceased was hit by arrow, he fallen down on the ground, which is field, and he was expected to have some marks on his body, but according to PW-2 Medical Expert, there were no injury at all expect piercing wound on the body of the deceased.

22. Further the arrow and the clothes of deceased and accused recovered by the Investigating Officer during investigation are not sent to the Forensic Science Laboratory. True it is that when direct evidence is credible and worthy of acceptance, such corroborating evidences cannot assume any importance but when the prosecution case stands at a juncture that the direct evidence is found being inferior in quality, then such evidence must be corroborated by other evidence. It is also true that, lapse on the part of the Investigating Agency cannot earn any bonus to the accused, but the at the same time when such evidence assumes importance in shape of corroboration to the direct evidence, then such lapse must be added to the benefit of the accused.

23. Thus, appreciating the evidence from all the

corners, we are unable to subscribe the view taken by the learned Trial Judge in respect of the charge under Section 302 having been proved by the prosecution against the accused appellant beyond reasonable doubt. As discussed above, the evidence of eye witnesses is found suspicious. Prosecution case suffers from other important infirmities resulting in one more possible view that the accused might not have committed the crime. In these circumstances, the accused - appellant is entitled to reasonable benefit of doubt. Therefore, while allowing the Appeal of the accused - appellant, we set aside the judgment and order impugned in this Appeal convicting the accused appellant for the charge under Section 302 IPC and sentencing him for the life imprisonment and fine of Rs. 1,000/- in default to undergo three months RI, when the case is not proved beyond reasonable doubt against the appellant accused we acquit the accused - appellant of the charge under Section 302 IPC levelled against him.

24. In the result, this Appeal is allowed. The order and judgment impugned in this Appeal convicting and sentencing the appellant accused is set aside. Appellant - accused is given benefit of doubt and acquitted of the charge under Section 302 of the Indian Penal Code levelled against him. Appellant - accused be set at liberty forthwith if he is not required to be detained for any other purpose in jail. Fine if paid by the appellant - accused be refunded to him forthwith.

(B.J. Shethna, J.)

(J.R. Vora, J.)

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